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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of	)	
Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana	)	CC Docket No. 98-121

COMMENTS OF BELL ATLANTIC ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION

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COMMENTS OF BELL ATLANTIC[1] ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION

1. Introduction and Summary. The Commission should deny AT&T's and Sprint's Petitions for Reconsideration and/or Clarification, because they seek to relitigate issues the Commission has already decided against them in other proceedings. The Commission should reconsider its Order,[2] however, to the extent necessary to ensure that the Commission's rulings are consistent with the Telecommunications Act of 1996, and to make clear that it has not pre-judged future applications on the limited facts of a single application.[3]

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[1] The Bell Atlantic telephone companies (Bell Atlantic) are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

[2] *Application of Bellsouth for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order (rel. Oct 13, 1998) ("Order").

[3] The Petitions for Reconsideration and/or Clarification raise a number of broad legal and policy issues that, if they were to be addressed here, could have an impact on other section 271 applications, regardless of the Bell company involved or the state at issue. While Bell Atlantic is not in a position to address the specific facts relied upon by

2. AT&T's attempt to rewrite the Act's Track A requirements should be rejected. AT&T once again seeks to impose additional requirements on the Bell companies in order to satisfy Track A that are found nowhere in the Act. AT&T's attempt to relitigate issues here that the Commission already correctly resolved against it should be rejected.

AT&T argues (at 16) that "the Act requires that compliance with the competitive checklist be demonstrated through full implementation of commitments contained in interconnection agreements," and that making checklist items available through a Statement of Generally Available Terms and Conditions (SGAT) is insufficient to meet the requirements of Track A. AT&T is wrong. Interconnection agreements, SGATs, and tariffs each impose "a concrete and specific legal obligation to furnish the item upon request" pursuant to state-approved prices, terms, and conditions. *See* Order, ¶ 54. Accordingly, a Bell company may demonstrate that it complies with the checklist through a combination of any of these documents.

To the extent AT&T uses "full implementation" to suggest that a competitor must actually be using each checklist item, the Commission also should reject AT&T's argument as an untimely request to reconsider the *Ameritech-Michigan* order.[4] As the Commission held there, the requirement to "provide" the items on the checklist does not mean that a Bell company filing under Track A actually must be furnishing each of the checklist items to one or more qualifying competitors. *Ameritech-Michigan Order*, ¶ 107-115. Rather, the only interpretation that is compatible both with the express terms

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BellSouth in its application, these comments briefly address several of these broader issues.

of the Act and with Congressional intent is that a Bell company must "make available" each of the items on the checklist *Id.*, ¶109-111; *see also* Random House Unabridged Dictionary (2d ed.) (a principal definition of "provide" is to "make available"). Any other result would leave a Bell company – and development of long distance competition – hostage to the strategic purchasing decisions of its competitors, and produce the anomalous result that competitors with all of their own facilities would not qualify as Track A providers. *Id.*, ¶110.

Finally, AT&T argues that, where compliance with checklist items is shown through the SGAT, carriers should be allowed to incorporate particular provisions of the SGAT into their interconnection agreements "without onerous extraneous conditions" – that is, to pick and choose only the terms and conditions from the SGAT that they like, without having to accept those that they don't. AT&T at 16. The SGAT must be approved by the State commission, and "may not" be approved unless the State finds that it complies with section 251 of the Act and that the prices are just and reasonable. 47 U.S.C. §252(f). Allowing a carrier to pick only favorable terms from the SGAT – without State-approved related conditions the carrier may view as unfavorable – and to replace terms of its negotiated interconnection agreement "thwart[s] the negotiation process and preclude[s] the attainment of binding negotiated agreements."[5] Moreover, it destroys the state-approved structure of the SGAT. AT&T should no more be permitted

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[4] *Application of Ameritech Michigan to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd 20543 (1997) (*"Ameritech-Michigan Order"*).

[5] *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 801 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998).

to pick and choose terms from the SGAT than it would be permitted to pick certain terms from a tariff while refusing to comply with others.

3. The Commission should clarify that it has not imposed an "actual competition" standard that Congress rejected. In analyzing the evidence concerning PCS service in Louisiana, the Commission commented that, "there is no evidence that the New Orleans respondents are similar to the state-wide PCS user population." Order, ¶ 37. The Commission also stated that it was unlikely that "any significant number of wireline exchange customers" would switch to PCS service based on price because "fewer than one-half of 1 percent of BellSouth's wireline customers in New Orleans currently have a calling pattern and use of vertical services that could be purchased more cheaply from a PCS provider." Order, ¶¶ 40, 42. The Act does not require that Track A carriers be serving customers throughout the state, or be likely to serve any particular number of wireline exchange customers, nor does the Act prohibit carriers that have chosen to serve niche markets from qualifying as Track A carriers. The Commission, therefore, should make clear that it has not imposed a requirement for carriers – whether PCS or otherwise – to be operating on some minimum scale in order to qualify under Track A.

Indeed, the argument that competitors must be operating on some minimum commercial or geographic scale is precisely the type of actual competition standard that Congress itself rejected in favor of a competitive checklist that "ensure[s] that a new competitor has the ability to obtain any of the items from the checklist." 142 Cong. Rec. E261-262 (daily ed., Feb. 29, 1996). For example, the Senate expressly rejected an amendment that would have conditioned entry on the presence of a competitor "capable of providing a substantial number of business and residential customers" with service.

141 Cong. Rec. S8310, 8319-20 (daily ed., June 14, 1995). Similarly, the long distance carriers consistently urged the adoption of an "actual and demonstrable competition" standard, but that standard was rejected by Congress as well. The Commission should clarify, therefore, that there is no geographic scope or market penetration requirement – no level of actual competition that must be demonstrated – to meet the requirements of Track A.

4. The competitive checklist cannot be expanded to require fully automated access to operations support systems. BellSouth seeks clarification that complex orders requiring manual handling may be excluded from the calculation of the percent of orders that "flow through" to its service order processor. BellSouth Petition at 7. While Bell Atlantic is not in a position to comment on the specific facts of BellSouth's order processing, its request raises several important issues. First, there is no checklist item requiring that the Bell companies provide fully automated access to their operations support systems,[6] and there is an express statutory prohibition against expanding the terms of the competitive checklist, 47 U.S.C. § 271(d)(4).

Moreover, while the Commission has concluded that incumbent carriers must provide non-discriminatory access to their existing operations support systems, it also has made it clear that they may do so in any way that allows competitors to provide service in "substantially the same time and manner" that the incumbent provides service to its own

[6] In this context, fully automated access means that, in addition to the capability to receive orders from competitors over an electronic interface, once the orders are received they flow mechanically through the ordering process into the service order processors without the need for manual handling.

customers. *Local Competition Order*, 11 FCC Rcd 15499, ¶ 518 (1996). So long as a Bell company can demonstrate that it has systems and processes in place that are capable of meeting this standard – and that they are capable of doing so at the volumes it reasonably expects to receive – there simply is no rational reason to deny it long distance relief solely because its internal systems for processing orders (once they have been received from a competitor) may, in some instances, require a degree of manual intervention.

Conversely, a company that demonstrated a high level of flow through, but whose actual performance showed that it could not handle reasonably expected volumes of orders in a way that would allow competitors to provide service in "substantially the same time and manner" that the incumbent provides service to its own customers, presumably would not meet the Commission's standards. In short, the amount of "flow through" or "fully automated processing" provided by a Bell company is a red herring – the relevant question is whether it can handle transactions for competing carriers consistent with the Commission's standard.

Finally, some orders – generally those for complex services – require a degree of manual processing whether submitted by a retail customer or by a competing carrier. If competing carriers submit a higher proportion of such orders than retail customers do, however, the percentage of competing carrier orders that "flow through" will be smaller for competing carriers even where the actual processing of every order type is exactly the same whether submitted by a retail customer or a competing carrier.

As a result, it would be arbitrary and unreasonable to adopt a categorical rule requiring fully automated processing or equal percentages of flow through on the limited

facts of a single application. This is especially true given that future applications are likely to present different facts, and different levels of proof. For example, when Bell Atlantic files its applications, they will be supported by concrete proof of our capability to handle actual commercial volumes notwithstanding the fact that some types of orders may have to be processed with some manual intervention. The Commission should not foreclose such proof.

5. The Commission should not impose uniform national performance measures or standards. BellSouth asks the Commission to vacate its discussion of performance measurements in connection with the public interest requirement. BellSouth Petition at 18-19. The Commission's Order states that "the presence or absence of any one factor would not dictate the outcome of the public interest inquiry," Order, ¶ 362, and "stress[es] that such factors are not preconditions to BOC entry into the in-region, interLATA market," *id.*, n. 1136. The Commission should clarify, therefore, that its statement of "particular[ ] interest[ ] in whether . . . performance monitoring includes appropriate, self-executing enforcement mechanisms" and its intent to "inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard," *id.*, ¶ 364, do not establish new, *de facto,* requirements for approval of a section 271 application.

The Commission has already appropriately declined to adopt mandatory performance measurements, standards, or enforcement mechanisms.[7] *Performance*

[7] The Commission does not have authority to adopt mandatory performance measurements, standards, or enforcement mechanisms. Under the Communications Act

Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Notice of Proposed Rulemaking, 13 FCC Rcd 12817, ¶¶ 23, 125, 130 (1998). The 1996 Act establishes a process of negotiation, with arbitration by state commissions if necessary, for carriers to set the terms and conditions governing interconnection of their networks, purchase of services for resale, and access to unbundled network elements. 47 U.S.C. §252. And this is the process that must be used to establish performance measures and standards.[8] The Commission may not impose such requirements through the "back door" of the public interest inquiry. To do so would effectively add a new requirement to the checklist, which Congress foreclosed the Commission from doing.

6. The Commission may not use decisions on Section 271 applications to expand the scope of obligations under Section 272. Under section 271 (c)(3)(B), the Commission must determine whether an applicant's long distance service "will be carried out in accordance with the requirements of section 272." Section 272 (b)(5) requires public disclosures only of transactions between a long distance carrier and its affiliated "Bell operating company," and not transactions with any other affiliate. The Commission's

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of 1934, as amended, jurisdiction over the intrastate provision of telecommunications services, including services to competing carriers, belongs to the states. 47 U.S.C. § 152(b).

[8] MCI WorldCom's argument that performance standards and self-executing remedies are the only way to "curb the BOCs' natural incentive to provide poor service to competitors following section 271 entry," MCI WorldCom Opposition at 17, is simply wrong. The Act expressly gives the Commission authority to ensure that Bell companies continue to meet the requirements for approval of a section 271 application, including by suspending or revoking such approval. 47 U.S.C. §271(d)(6). That possibility alone provides ample incentive, if external incentive were needed, to ensure that a Bell company will continue to meet its statutory obligations.

rules implementing this provision also limit the provision to "transactions with the BOC." 47 C.F.R. § 53.203(e). In the face of this clear language, AT&T argues that the Commission "misunderstood" its earlier argument; according to AT&T, it does not seek disclosure of all non-telephone affiliate transactions, just some of them. AT&T Petition at 18-19. In particular, it seeks disclosure when the affiliate acts as a successor or assign of the Bell operating company, or for "chain transactions." *Id.*

AT&T can point to no language in the Act or the Commission orders on section 272 supporting its proposed expansion to chain transactions. Indeed, the Accounting Safeguard Order's discussion of chain transactions made clear that the obligations imposed there relate to *valuation* of the transaction. *Implementation of the Telecommunications Act of 1996, Accounting Safeguards*, 11 FCC Rcd. 17539, 17606 and 17623 (1996) ("Accounting Safeguards Order"). The Commission therefore correctly determined that, so long as network facilities had not been transferred to another affiliate, the appropriate check on transactions with other affiliates is the biennial audit, not some new public disclosure requirement. Order, ¶ 338.

AT&T also claims that the right of a Bell company under section 272 (g)(2) to market and sell the long distance service of its affiliate cannot be exercised when the customer places the call. AT&T's argument to limit joint marketing and sales to outbound efforts flies directly in the face of Congressional intent to provide "the same one-stop shopping alternatives that long distance companies can offer." *See* 141 Cong. Rec. E1913-02, E1913 (Oct. 11, 1995) (remarks of Rep. Mike Ward, Kentucky). While AT&T can market all of its services to inbound callers, and in the future to customers

calling its monopoly cable TV affiliate, AT&T would deny the equivalent convenience and ease of doing business to customers calling Bell Atlantic.

The Commission specifically rejected AT&T's arguments in the rulemaking proceeding. There, the Commission found that, as part of a BOC's "right to market and sell the services of [its] section 272 affiliate[ ] under section 272 (g)," it "may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice." *Implementation of the Non-Accounting Safeguards of Section 271 and 272*, 11 FCC Rcd 21905, ¶ 292 (1996) (Non-Accounting Safeguards Order"). That is exactly what BellSouth proposed to do. The Commission should reject AT&T's attempt to overturn the rulemaking decision in the context of one carrier's long distance application.

The Commission should reconsider its Order, however, to the extent necessary to ensure that it is consistent with the Act. For example, the Commission faults BellSouth for failing to meet disclosure requirements concerning affiliate transactions that took place prior to the time such requirements were announced by the Commission. Such retroactive application is unreasonable on its face, and is especially inappropriate here where the only purpose of looking at past transactions is as a measure of future compliance with section 272 obligations.[9] Whether or not a carrier applied disclosure rules retroactively is irrelevant to the question of how those rules will be observed on a prospective basis.

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[9] All parties agree that there is no requirement for a carrier to comply with section 272 prior to approval of a section 271 application. *See* MCI WorldCom Opposition at 12 ("the FCC did not impose any such requirement").

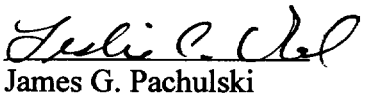
The Commission's Order also expanded the requirements of section 272 by requiring disclosure of additional details such as the number and expertise of the employees working on a given transaction. In its rulemaking implementing this statutory provision, however, the Commission rejected arguments in favor of additional reporting requirements. Non-Accounting Safeguards Order, ¶ 193. Instead, it merely required that the writing describe the transaction and its terms and conditions with sufficient detail to evaluate "compliance with [Commission] accounting rules." Accounting Safeguard's Order, ¶ 122. The new requirements suggested in this order go well beyond that mandate.

Moreover, the new requirements violate the intent of section 272. The entire separate subsidiary requirement drives a Bell company to treat its long distance affiliate the same as a non-affiliated customer. By requiring that a Bell company track the identity and expertise of individual workers performing a service, it guarantees that the affiliate cannot be treated like any other customer, but must instead be scrutinized with special tracking and handling – precisely the type of special attention otherwise discouraged by the Act.

CONCLUSION

The Commission should reject the petitions of the long distance companies that seek to relitigate issues decided against them in other proceedings or to force decisions contrary to the terms of the Act. The Commission should reconsider its Order as discussed above, however, to ensure that it is consistent with the Act and with the intent of Congress.

Respectfully submitted,



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December 15, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1998, a copy of the foregoing "Comments of Bell Atlantic on Petitions for Reconsideration and Clarification" was sent by first class mail, postage prepaid, to the parties on the attached list.

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